MINUTES
REGULAR MEETING OF THE BOARD OF LAND COMMISSIONERS
Monday, October 18, 2004, at 9:00 a.m.
State Capitol Building, Room 303

PRESENT: Governor Judy Martz, Superintendent of Public Instruction Linda McCulloch, Secretary of State Bob Brown, State Auditor John Morrison, and Attorney General Mike McGrath

Motion was made by Ms. McCulloch to approve the amended minutes of the Board of Land Commissioners' meeting held September 20, 2004. Seconded by Mr. Brown. Motion carried unanimously.

BUSINESS TO BE CONSIDERED

904-7 2004 SUSTAINED YIELD CALCULATION

Mr. Clinch said the department has been involved in the 2004 Sustained Yield Calculation for nearly a year and last month we brought this item before you and gave an extensive technical presentation. The Board decided to defer action for a month and grant a longer public comment and review period.

David Groeschl, DNRC, handed out a document that summarized the department's response to the public involvement process. He said the comment period was extended to October 4, 2004, to allow for additional public comment on the Sustained Yield Study, we also responded in writing to comments submitted by Jane Adams and Arlene Montgomery regarding their concerns. I met with both of them in Kalispell on October 7th, along with Paul Engelman of DNRC, and tried to address their concerns after submitting our written responses to them regarding their comments. We met with them to try to clarify anything they had additional concerns on. On October 15th, we sent out a set of responses to the public comments that were received by October 4th. That is the summary of the public involvement since the release of the Sustained Yield Study.

Meeting with Jane and Arlene there were a couple of main concerns they had and there was some confusion as to where some of the numbers came from. We also drafted a five-page summary of the six most frequent comments that we received from the public and our responses to those. The main issue raised was that there was confusion at the last Land Board meeting. Mark Rasmussen had presented a number showing 83 MMbf of growth versus the biological potential being 95 MMbf. That deals with question two or comment two in the summary and our response is response two. The handout addresses the issue of 83 MMbf versus 95 MMbf, and the graph attached to the handout. To try to explain this as clear as we can, the 95 MMbf represents the biological potential and basically that means on the 668,000 acres of commercial forest land the state has, the only constraint being the non-declining yield constraint, the land has a capability of producing 95 MMbf of yield over the long term with just that constraint applied. That allows the model to pick the best management option. Typically the model was selecting even-aged management. Without any additional environmental constraints on the land the model was indicating that the land was capable of producing 95 MMbf per year. In sustained yield calculation run #008, the 83 MMbf represents the growth that occurs in the first period. That is showing we have about 3.8 billion board feet of standing inventory right now. So between period 1 and period 2, that 3.8 billion board feet of standing inventory would have a growth of about 83 MMbf per year during the first five years. The 53.2 MMbf is the harvest level that was calculated during run #008 with all the constraints

applied. That indicated that across our land our growth exceeds harvest by approximately 30 MMbf per year. The 53.2 MMbf is a sustainable harvest level.

Governor Martz said so, at the end of five years, 150 MMbf is not being used, right? The 30 million is in excess every year so its growing.

Mr. Groeschl said yes, we're adding to the inventory every five year period about 150 MMbf to the standing inventory.

Mr. McGrath said in terms of the period numbers on the bottom of the graph, we're talking about out years beginning now?

Mr. Groeschl replied that's correct.

Mr. Clinch said those numbers are in five-year increments.

Mr. Groeschl said yes, the period shown below on the graph are five-year increments.

Jane Adams, Old Growth Project, said she had problems with the study. One is that the model assumes that even-aged management is more productive than uneven-aged, and there are statements throughout the document to this effect. Basically even-aged management is clear cutting and the variations of clear cutting and uneven-aged management is selective harvesting which allows the foresters to practice good forestry. This bias is programmed into the model and it is important to remember that the model only does what the humans running it tell it to do. If the modelers tell it that even-aged management is more productive, then the model will calculate numbers accordingly. I researched and talked to a silvicultural professor at the University of Berkeley, Kevin O'Hara, who said he wasn't familiar with any data, none, that indicates that even-aged stands are more productive than uneven-aged. I asked DNRC for any data or research that backs up their assumption and they haven't been able to produce anything. Clear cutting is easier for DNRC and it is more profitable in the short term, but the Board has the responsibility to see that these lands are profitable and productive in perpetuity and I don't think that relying heavily on clear cutting is a good idea. In addition to the artificially-inflated sustained yield target and the over harvesting that will result, I am also concerned about the environmental consequences. The State Forest Land Management Plan (SFLMP) placed a limit on the amount of even-aged management allowed under the different alternatives. While the study doesn't exceed that numerical limit, it doesn't abide by the SFLMP because it assigns the most productive lands to even-aged management. To the extent possible the model assigns the more productive lands to even-aged management. This is a big departure from the SFLMP, which has a clear emphasis on maintaining biodiversity and the range of forest types and structures across the landscape. The most productive lands are critically important for maintaining biodiversity, much more so than the less productive lands. Clear cutting and seed tree harvesting essentially wipe out the forest ecosystem on that type of land and the negative impact extends well in the surrounding forest. I think this has a huge negative affect on biodiversity and it will not follow the intent of the plan. Another place the study violates the intent of the plan is in regard to old growth. Literally all of the old growth would be either harvested or intensely managed, none would be managed on long rotation. Some stands would be entered every 30 years bringing the stand down to the very minimum to even begin to qualify as old growth, and some stands would entered every 50 years with a slightly less intense harvest. But the department doesn't tell you how many acres or what percentage of the forest will be harvested with either type of treatment. They constrain the model that after 100 years, only 7.6% of the landscape will be old growth. This is far less than the historic amount. DNRC estimated that historically 32% of the Stillwater

was old growth and 36% of the Swan River State Forest is old growth. And now they are proposing to maintain less than one fourth of that amount. The small amount they propose to maintain won't be similar to the historic old growth by any stretch of the imagination. It will have been entered numerous times removing the large trees, snags, and downed wood – all the things that make old growth valuable to wildlife and all the creatures that depend upon it. Worse yet, the Sustained Yield Study proposes to harvest the most productive lands first. For old growth that means the highest quality old growth. This is the kind of old growth that has historically been heavily harvested and is much less abundant that it was, it is also the most valuable biologically. There is no provision in this study to maintain any of the kind of old growth that is biologically the most valuable. The language in the rules is clear about biodiversity. It says it is going to follow the coarse filter approach, and the definition for coarse filter is, "A coarse filter approach assumes that the landscape patterns and process similar to those the species evolved with are maintained then the full complement of species will persist and biodiversity will be maintained." This study does not follow the administrative rules regarding old growth and biodiversity. I asked DNRC several questions about how old growth would be managed and they brushed aside my questions by saying additional analyses are beyond the scope of the study. I didn't ask for any more analyses, I asked a simple question. They also stated the sustained yield calculation should not be confused with the MEPA analysis that is designed to display effect. The required MEPA analysis is contained in the SFLMP, however, §77-5-116, MCA, has required the removal of the numerical old growth retention requirement. This brings up an important point, DNRC has never done a MEPA analysis on removing the old growth commitment and intensely managing the state's old growth. The environmental impact of what was analyzed under MEPA in the SFLMP is far different from what is supposed in the Sustained Yield Study. Those two points are what I have a problem with, the old growth and heavy reliance on even-aged management. I think that until those pieces can be analyzed the study should be put aside.

Julie Altemus, Montana Logging Association, said the MLA represents over 600 independent logging contractors each of which operate a family-owned enterprise that harvests and transports timber from forest to mill. In Montana, the vast majority of timber land is owned by government agencies, therefore, the welfare of the Montana Logging Association members was directly dependent upon the policies and actions of the public land managers. Before you today is the pending adoption of the state's sustained yield calculations for school trust lands as mandated by the 2003 Legislature. First, I'd like to sincerely thank the Board for its support when HB 537 was being considered in 2003. I'd also like to thank the DNRC and its dedicated staff for their scientific expertise, thoroughness, and professionalism throughout the calculation process. In 1996 a scheduled check listed 58.6 MMbf sustainable biological harvest level on 616,825 acres. The state adopted a 42.2 MMbf harvest level on 363,780 acres allowing management to occur on 59% of state forested acres. The 2004 study calculates the biological sustained yield at 94.6 MMbf on 726,662 acres. The DNRC is requesting the adoption of the sustained harvest level on 53.2 MMbf on 430,784 acres allowing management to occur again, on 59% of state forested acres. Both the 1996 and the 2004 sustained yield calculations used consistent modeling restrictions to reflect constraints and mitigation measures for wildlife and old growth based on policies and laws in effect at the time. Coupled with modeling constraints, various components of the forest management model were validated during development by comparing known yields and field data to model results. Data and forest maps are available for all stands and field foresters validated data on the ground. In addition, inventory in the model was reviewed both in total and by geographical subdivisions within the model. The study discloses volume for each model run, incorporating species, stand structure and condition, age, fire history and other relevant factors. All known current conditions were incorporated through the use of the stand level in this model. Even though the effects of fire and insect epidemics are not modeled explicitly, all models have mortality functions designed to represent the on going endemic problems of various causes of mortality. In essence, the proposed 53.2 MMbf harvest level is a conservative harvest rate. The DNRC

has an excess amount of existing board feet volume necessary to maintain the proposed annual harvest level. The model indicates 58 MMbf can be harvested over the next 50 years and still maintain a stable harvest rate. This provides a significant level of assurance that 53.2 MMbf are sustainable over the long term. Increasing the sustained yield from 42.2 to 53.2 MMbf represents a present net value of $146.1 million to the trust. Coupled with the economic benefit, actively managing state land reduces the risk of catastrophic fire, mortality loss to insect infestation, provides wildlife habitat, enhances fisheries and recreational opportunities while providing for the economic benefit to school trust lands. Therefore, the MLA requests the Board move to adopt the sustained yield calculation, we sincerely believe that all questions have been thoroughly and scientifically answered by the DNRC staff.

Arlene Montgomery, Friends of the Wild Swan (FOWS), said I want to thank you for the opportunity to speak here and for extending the comment period on the sustained yield calculation study. I did meet with DNRC staff earlier this month to review their responses to our comments and there were still concerns that we had. What Mr. Groeschl handed out to you today was e-mailed late Friday afternoon, and I didn't time to look at what he was saying dealing with the current growth of 83 MMbf versus the biological potential that is in the study of 95 MMbf. I want to say that I could not find in the study where DNRC addresses the growth before or after the model runs. We had a long discussion when I met with DNRC and their answers were quite different from what I am hearing today about somehow this growth being incorporated into the sustained yield calculation #008 model run. My take on the difference between the growth and the biological potential is that under optimum conditions they could grow 95 MMbf and that would be with additional personnel and more careful tending to the young trees. But we all know that conditions are not always optimal. Budgets fluctuate and chance natural events occur so we believe it would be prudent to use the current annual growth rate as a baseline to determine the sustained yield and then do these other tasks and see if your growth rate increases and if it does, the next time the model is run, then you use that figure. DNRC dismissed many of the other concerns we had such as real estate development or decreasing the number of acres, by saying that the next study will catch those changes. Yet, we feel they put on rose-colored glasses and used this biological potential growth rate which we feel is not prudent. I would like to urge the Board to ask the department to rerun the model to reflect their growth rate or rerun it to reflect what we heard today and not use the arbitrary MMbf potential growth rate and we may have a clearer picture of what is actually sustainable. I do concur with what Ms. Adams said earlier.

Anne Hedges, MEIC, said I have talked to a lot of experts in the last month and I would like to share with the Board what they had to say because it is very instructive and very informative to this discussion. One thing you have to keep in mind is the public had this document to go off of and when DNRC starts saying we did incorporate that, we say where? How do you make that mix with what we're reading? There is a lot of explanation that is missing. If this were a MEPA document we would see that analysis and the data that they say they are relying on. We haven't seen that data yet and that's where our concerns are. We're not saying that the modeling isn't a dynamic field and that things aren't going to change over time and that we're not going to have better information perhaps and be able to harvest more trees. We believe that might be true. However, we don't see that in this document, the proof is not there. I find it disturbing and disappointing that the state had to go out-of-state to a timber industry consultant to do this study when we have a world class forestry school here. Every person I spoke with at the forestry school was curious and interested in the study and were questioning as to why the state didn't use them. We need to support schools both through the resource extraction and the utilization of state school trust land, but also through encouraging those divisions in our school systems that can do these types of analysis in an unbiased manner. There should have a policy that directs DNRC to try to utilize state educational institutions for these types of studies before contracting with an out-of-state company.

In regard to the study, the question I have is how DNRC can say one thing in a study document regarding mortality rates primarily due to fire and insects and say something completely different in response to public comments. There are a number of factors that influence mortality, like climate change. The climate is changing, the warmer climate is increasing the drought and leading to an increase in fires and insects. The *Journal of Conservation Biology* had a peer-reviewed article last year discussing the effect of climate change on the amount of area that is expected to be burned. The study found that Montana was the most sensitive of the western states and could see a 50% increase in area burned due to climate change. That is a big change. Despite this year, Montana has been experiencing a severe drought. The scientists all agree that our forests are just beginning to see the effects and the drought is going to increase insect infestation and fires. Insect infestations, according to entomologists in the state, are at critical levels. They are not quite sure what's occurring, but they are seeing an enormous increase in insects in the last two years and don't see much sign of abatement. Despite these, the Sustained Yield Study says on page 34 and 35, "While the growth and yield model projections account for competition-induced mortality they do not project episodic mortality from insects, disease, and fire. They do consider competition-induced mortality. The model doesn't account for mortality due to fire, insect, and disease. This is a problem. DNRC's response to our comments in this regard is that mortality was captured. The study said it wasn't, and our answer is show us your facts. The only way to see the answer is to see the data DNRC relied upon to determine mortality rate. Mortality varies across the state. You have some forests that are being heavily impacted by insect infestations and other forests that aren't seeing the increase. If they did include mortality, why won't they show us the figures they relied upon to determine whether mortality was included and to what degree. That's what we are lacking here and that's what we'd like to see. To start determining how much loss is going to occur on state school trust forest lands because of mortality from fires and insects the state could use a model the Forest Service has developed, its called the SIMPPLLE model, it's purpose is to determine the impact of fires and insects over a 75-year period. This is exactly what the state needs to do here. The Forest Service, BLM, and private landowners are all relying upon this model right now. The model can be downloaded for free off of the Internet. The acronym for the model is SIMPPLLE because it really is quite simple to use, it's based on vegetation data on the ground. The Forest Service personnel said they would be willing to come to the state and sit down and talk to them about how to use this model. It is an important planning tool that everyone else seems to be using and its free and the state should incorporate this tool into its model as another layer of consideration. Perhaps, as the state said in it's responses to some of our comments, mortality won't change our sustained yield number much but we don't know that and neither do they. Furthermore, I find it interesting they bothered to say this if they don't believe that it is not going to change the overall number and say at the same time in another place that it was included in the analysis. Either it was or it wasn't, DNRC has provided no data to that effect. What we are saying is they should incorporate a tool like the SIMPPLLE model into its planning process regardless of the sustained yield calculation. For the state to say it won't worry about fire and insect damage because it will recoup that through salvage logging is naïve at best. Stands are on a 75-year rotation cycle. Fire and insect damage prior to that 75-year timeframe will lead to salvage harvest of smaller trees and therefore smaller volume and set that section back many years. Fires in younger stands are more likely to destroy the stand, there will be no salvage logging and 25 to 50 years of growth could be lost. Salvage logging after fires and insects will have a lower volume and a lower value. An incremental loss each year may not be worth harvesting in that 175 year timeframe. That should be accounted for. DNRC says using the SIMPPLLE model will not work because it is a predicted model and is not based on inevitabilities. The entire exercise of sustained yield calculation is based on predictions. We are trying to take what we know today and predict out into the future. That is what models like the SIMPPLLE model do. I am not here to tell you we have the answers and know the answers but I am here to say I don't think DNRC knows the answers either, and

until it provides more analysis its information is just a guess, not reality. I would ask the Board to think about asking DNRC to engage in the SIMPPLLE modeling process and bring back those figures to the Board at some period of time when its completed that analysis, at that time the Board can determine whether this information is useful, whether it will need to adjust the sustained yield calculation based on that information. Until that's done we won't know if this study is accurately reflecting mortality due to insects and fires, which are significant.

Senator Duane Grimes, SD 20, said I am glad Ms. Hedges thinks the new streamlined MEPA is working so well, that's the essence of the problem. It is not a precise science, they don't have the answers. The Board has the opportunity before it to send the message to the logging industry for the future of Montana that we will take reasonable studies that have been done and we will apply them in a reasonable fashion. We can adjust later if adjustments are needed. Frankly, there is very little salvage logging going on now because of appeals. We used to harvest over a billon board feet a year in this state, now we're down to 250 MMbf on all lands and only if it is not held up in legal delays. This Board with the stature of its position could, because those federal lands so intricately affect state trust lands and the timber on it, be a tremendous proactive force. I think this delaying tactic that was clearly intended to try to bring up more information to obstruct this study from going forward sends the wrong message. I think you can turn that around today and send the right message to the industry by saying we are going to harvest in Montana reasonable timber to help us manage our forests. The reason we have more forest today than we ever had in its history is because we managed forests. And yet, what is happening now is we are fiddling while Rome burns. Very literally we are, as in legislative sessions and we've seen it politically, is statistical paralysis, semantical paralysis. I urge the Board to go ahead of this decision.

Motion was made by Ms. McCulloch to accept the 2004 Sustained Yield Calculation. Seconded by Mr. Morrison.

Ms. McCulloch said Ms. Hedges has brought up something that has come to our office by way of concern. That was the question of the determination to go through the private company for this study rather than going through the University of Montana school. Can you address that?

Mr. Clinch said the overriding contract for this is with a firm called Parametrics, the firm that's doing the Habitat Conservation Plan (HCP) that we have briefed you on several times because the sustained yield will be an integral part of that. There is a subsequent subcontract to Mason, Bruce and Girard to provide this information. Frankly, we are interested in dealing with the most competent firm out there. Not to disparage our friends at the University of Montana or at other areas, but I think we have an obligation to the beneficiaries to make sure we are securing the services not only in a reasonable fashion in terms of financial costs, but in terms of output. That has been our goal from the beginning, to make sure that the entity involved is totally capable and staffed appropriately. Mason, Bruce and Girard are noted as the nation's authority on sustained yield studies. Contrary to what Ms. Hedges said about them being an industry group, we have provided information to the staff, and this Board as well, that they have a strong record of providing information and similar studies for the States of Idaho and Washington, other federal agencies, as well as private industry. The credentials associated with the organization that has done this is beyond reproach.

Tom Schultz, DNRC, said the big issue here was the Parametrics contract regarding the HCP. We had about eight firms nationally bid on the HCP contract. The state has fairly rigorous requirements in terms of RFP selection, you look at both experience as well as cost. When we looked at the total package regarding the HCP, the firm Parametrics of Washington State came out on top and then they

subcontracted with Mason, Bruce and Girard prior to this calculation who were identified at that time as doing all the forest modeling for the HCP. This number is the baseline for the HCP. When we do the "no action" alternative for the MEPA analysis for the HCP, this model will serve as the "no action" alternative and then there will be additional alternatives developed. The only contract issue with Mason, Bruce and Girard regarding this is that they are producing this report right now. But this report really serves as the baseline environmental analysis for the Habitat Conservation Plan.

Ms. McCulloch said isn't it our intent to do another similar study in about three years when we do the Habitat Conservation Plan?

Mr. Schultz said that's correct. As part of the development of the HCP we will develop a range of alternatives. Whether that is three or four alternatives, I don't what that will be, but each of those alternatives will have a sustained yield calculation associated with it. As we have a different level of mitigations and environmental constraints due to conservation strategies for the species we are looking at, each of those alternatives will generate a new sustained yield as a component of that. In 2007, we will have a completed HCP and a range of alternatives to select from, each of which will have a different sustained yield number.

Mr. Morrison said would you address the issue of insects, disease and fire?

Mr. Schultz said Ms. Hedges brought up some good points, and at the meeting our folks had they raised some good questions. This particular issue with insects and disease the model was talking about, and Ms. Hedges pointed out a sentence in the report that says it is not included and then in our response we say it is kind of included. The model does not try to project out some periodic event of catastrophic wildfire. Maybe someone using a model could say there will be a catastrophic wildfire every 10, 20, or 50 years; how much of that occurs on state land would be difficult to predict. In 2000 we had about 14,000 acres in the Sula State Forest that burned and we did salvage a fair amount of that, about 30 MMbf when all was said and done. Our response to this particular question is that normal endemic amounts of insects and disease that occur will be captured in the model. The report talks about tree-induced mortality and our response is trees are dying over time. The model kills a certain number of trees in a period. To the comment that we haven't shown anyone the data, I'm sure if anyone wants to sit down and go over the data our staff can go through the data, but the model is projecting a certain amount of death. It happens in all models, you grow trees and you kill trees. That normal or endemic amount is in the model. It doesn't project catastrophic events. If we say the year 2008 may have a huge fire event in Montana, the model doesn't do that. In simple terms, what we're saying is in three years we're going to have another calculation. If in three years a big fire event occurs, we will rerun the model and account for that. At a minimum, we will run the model every ten years if not sooner if somebody directs us to do it. For example, the Board may say it wants us to do the run every five years. Whatever number we pick saying it will occur in 10, 20, or 50 years and its going to be of this magnitude, is hard to say with any degree of certainty. The general gist is we will rerun the model as often as we need to, and at a minimum of every ten years. We think that if there is an event that occurs through a ten year rerun of the model, we can capture that. Another point is we will be salvaging from burnt-over timber, a lot of the sales we bring before the Board are insect, disease and fire salvage sales.

For the most part we don't do a direct substitution of volume for volume in all cases. In 2000 we actually sold more volume than we would have historically because of the fire events. A lot of the volume that is salvaged we substitute for green volume. The point that we should be planning for these events is an interesting one. We have a difficult enough time planning for our green sales let alone trying to build in a

periodic fire event. We really try to take the concept of biodiversity and say on the ground what species composition do we want and where do we want it, and where do we want to have certain kinds of stands? A lot of these older age stands of grand fir and other stands we need to go in and manage those stands now to get them back into productivity. That would be a higher priority for me than trying to model out some predictive fire event that occurs every 20 or 30 years, or a massive insect and disease problem. We have such a workload now and to try and lay a model on top of that and further drive our management is more than we can possibly do and make any sense on the ground.

Mr. Morrison said to summarize your comments, would it be fair to say then that you think it is appropriate for the model not to include catastrophic insects, disease, and fire but that when the model is rerun periodically those kinds of events will be figured into the baseline and incorporated in that fashion?

Mr. Schultz replied yes.

Mr. Morrison said so as far as learning lessons for future models, you don't feel like we need to do more to incorporate catastrophic insects, disease, and fire?

Mr. Schultz said I would defer that question, I am not a modeler. The comment was made that DNRC doesn't know, and we don't know everything. I'm saying right now based on our information and how we are doing things it seems prudent not to try to put an additional constrain on the model which predicts fires. Maybe in five years or ten years when we run the model again and somebody says there is a better way to do it you should be looking at this more intensively, we may.

Mr. Clinch said from a practical standpoint 2000 was the biggest catastrophic year we've had in history with the Sula Forest burning. The department acted rapidly and we had a substantial amount of salvage logging. Even during that year that is a small percentage of our total overall acreage. Another thing you need to look at is we're talking about growth and when you're dealing with mature forests, just like you'd be dealing with a room full of 50-year old men, our growth has somewhat ceased and so depending upon the site-specific situation a room full of teenagers is having a lot more growth than a room full of mature individuals. For those without a great understanding of forestry a young forest, say at ages 10-20, after a catastrophic fire may have more growth than that previous forest did when it was in mature old growth status. The issue about growth may not be what it is being portrayed to be.

Mark Rasmussen, Mason, Bruce and Girard, said this issue about adjusting for fires is an interesting one. The question we're trying to answer with this model is how much harvest could be sustained over a long period of time given all the constraints and the policies overseeing the land. The question is if you thought there was going to be a fire sometime in the future what would you do? Would you do something different today because something was going to burn up in the future and you wouldn't be able to sustain the current level of harvest? Well, that's one way to think about it, another way is to maybe harvest more today so you're minimizing your exposure to the fire, you'd have less of your trust asset exposed to the potential fire. The compromise approach is what Mr. Schultz said, you look at the sustainable level of harvest today, if there is some big change in the future, then you recalculate it. But to reduce the harvest level today because at sometime in the future there might be a fire that would reduce the harvest level doesn't make a lot of sense. We do this kind of modeling all over the west, right now we are working for all of the national forests in Montana and Northern Idaho under a contract to do this kind of modeling and some of those forests are using the SIMPPLLE model to predict forests, but they have a different question. They are not trying to figure out what this sustainable harvest level is, they are trying to figure out how to get the forest back to a pre-settlement condition and they want to factor the fact that there

might be some fire into that because then they don't have to treat as many acres because some of the acres will be changed by fire. You have to look at what you're trying to do. What is the sustainable harvest over a long period of time? If there is a fire then you recalculate that, but it doesn't make sense to me if you're trying to get a good return to the beneficiaries to reduce it today because there is some chance that you won't be able to sustain it in the future.

Mr. Morrison said I want to make a comment in response to the comments of Senator Grimes. First of all, for the record and for Senator Grimes, it is not the purpose of this Board to send a message to any industry. The purpose of this Board is to manage the assets of the trust in the interest of the trust and its beneficiaries. And we do that in a careful manner consistent with our fiduciary duties. Secondly, the statement that this Board has been fiddling while Rome burns in the management of the state's forests is simply factually incorrect. This Board has approved every timber sale, I believe, that has been brought before it since this Board came together, a little less than four years ago. I believe the harvests that have been achieved under this Board have been record harvests on state lands. I am not aware of anyone who shares the view that this Board has under harvested or has fiddled while Rome burns in the management of the state school trust. We manage the forests in a responsible way, we've harvested in a sustainable way, we've produced considerable revenue for our schools and for the State of Montana, and we've done it while exercising good stewardship.

Governor Martz called for a vote on the motion on the floor which was to adopt the 2004 Sustained Yield Calculation. Motion carried unanimously.

1004-1 FIDELITY EXPLORATION AND PRODUCTION CO. v. UNITED STATES OF AMERICA

Governor Martz said this is not an issue that I think we should table, we are trustees, we have taken this duty on. It's an issue that is one of the things we have a duty to act upon and I would hope that is what we do today.

Mr. Clinch said this is an item that has been around for discussion and debate for several months. In September 2002 as part of the regularly scheduled oil and gas lease sale, we brought before the Board a package of tracts. Included in that were these five tracts leased to Fidelity Exploration along the Tongue River. The department routinely leases tracts under the bed and banks of navigable waterways. It is also important to know that when we go forth responding to applications and offering tracts for sale, we go through some due diligence to make sure we have a claim to ownership of those tracts prior to the acceptance of the application and ultimate offering of those for lease. As I said, in September 2002, these tracts were offered for lease, they were bid, we brought them before the Board and they were approved. Sometime recently, within the last six months, our lessee Fidelity approached us and said they had been contacted by the adjacent landowner, the Northern Cheyenne Tribe, claiming they had the ownership to the center line of the Tongue River. Fidelity approached us and asked if we were willing to go forth and secure a dispositive ruling relative to the ownership of that. We debated that and had discussion with the Board's staff and collectively we decided not to do that at that time. Unfortunately, that issue has not gone away. We've done a little bit more analysis to try to substantiate our claim, and we are further convinced that the ownership of the lands in question do, in fact, reside with the State of Montana. Also, we did some calculations on the 9.5 miles of these river beds and while these tracts are currently not in production, if they were to get into production similar to the adjacent CX Ranch coalbed methane production, we're looking at about $250,000 in royalty revenues due to the trusts per year. In trying to

come to resolution on the title, in addition to looking at the historical records relative to navigability we had a recent conversation with the chief of the Cadastral Survey branch of the BLM, although they couldn't definitively give us a decision, their review of the title information tells us that they also believe the state has a strong claim for title of these lands. The Governor has requested the department bring this issue forward for discussion at this meeting today for positive action. We are seeking permission from the Board to enter into intervener status and quiet title action that Fidelity has already advanced.

Monte Mason, DNRC, said Mr. Clinch summarized quite well the over-arching issue we face. The basis for our ownership is rooted in the Equal Footing Doctrine. The original 13 states entered the Union under English law which meant that they had ownership of navigable rivers. In an 1844 U.S. Supreme Court case, Pollard v. Hagen, all new states were recognized to enter the Union under an equal footing with those original colonies; therefore, all states since then own the land under navigable rivers. The test for whether a river is navigable is a federal test and is the actual use of a river that it is susceptible in its natural condition or with reasonable improvement to be used in commerce. There are two levels there, historical evidence of actual use and susceptibility for use in commerce. Log and tie floating has been accepted by the courts as evidence for commercial use. The state, through DNRC, takes a conservative viewpoint on that, especially for rivers that haven't been adjudicated, so we look at actual use versus susceptibility for use. In this case we have advised people in the past that we believe we have title to the Tongue River within the area that is leased by Fidelity based on historical evidence of actual use. However, there is also evidence of its actual use in Wyoming which leads to a federal test of determination of susceptibility for use for the entire stretch. Section 8 of the Enabling Act of 1889, affirmed that Montana entered under an Equal Footing and therefore we take the position and have leased these lands saying that they appear to be navigable rivers and that we have title to them. There was a Presidential Executive Order to the Northern Cheyenne Tribe expanding the boundary and the lands to be included in the Northern Cheyenne Tribe which cited that they would have a tract of land that now included the Tongue River to the middle of the channel. That was March 19, 1900. Obviously our legal basis for ownership pre-dates that. We are faced now with conflicting claims to ownership that needs to be resolved. We issued these leases in September 2002, and in doing so we issued lease documents to Fidelity that has a statement in them that these leases contain navigable river beds. We also have a statement in there that if they should find production that relates to these lands they will institute legal actions to clarify title if title is disputed. I would note the distinction there to the current action in that that stipulation presumes that navigability has been adjudicated. The typical situation is that we have a dispute as to how many acres we own within the navigable portion of a spacing unit, there can be islands, there can be abandoned channels, there are any number of technical situations that could affect how much acreage we own. In this case there is a predicate as to whether indeed the Tongue River is navigable. Fidelity is recognizing that and taking an action to quiet title to determine navigability in favor of the state. In talking with the BLM this factual situation that we're presented with puts them in somewhat of a dilemma in that they are responsible for surveying ownership of upland areas within the U.S. and on upland areas they are dispositive. They also have extensive expertise in the determination of navigability and have been asked by their own solicitor's office as to what this means to them in this instant case. The Branch of Cadastral Survey do not adjudicate title, they are the executive branch doing fact finding. Because adjudication affects property rights, that function is properly reserved for a court of law. The BLM does have the expertise and has reviewed the situation related to the Tongue River. In talking with the chief of the branch of Cadastral Survey in Billings, who is responsible for a multi-state area including Montana, they advised their solicitor's office that the historical evidence that is available and known to them at this point is such that comparing that to the federal test for navigability they would anticipate that a court would rule that the information is sufficient to determine navigability. It puts them into a little bit of a situation because it has not been adjudicated so even though they are aware of that evidence, when

people ask them what the current status of the river is, the federal government does not recognize a river as being navigable in the legal sense unless and until it has been adjudicated as such. So when asked, their formal position now is that the Tongue River has not been adjudicated, therefore they would recognize that landowners on either side would own to the center line of the channel. That would mean the Northern Cheyenne Tribe on the west, that would mean all fee landowners on the east; because for the private owners east of the Tongue River, the source for their title is out of the original patent from the federal government. They [Branch of Cadastral Survey] have reviewed those patents and report to me that all of those patents contain the normal language that is utilized for rivers that have not been adjudicated. That is, they do not include an express reservation of the riverbed as part of the title document conveyed to the fee owners. That means that if the fee owner asks the federal government at this point what to they own, they would advise on a non-navigable river that they own to the center line. Therefore, the issue before us has an impact to the state school trust as to whether we have clear title to the entire channel for the Tongue River, or none. The only way to resolve that is to have navigable river status adjudicated, and the only way to do that is to initiate an action which is before the Board. Because we are the potential landowner, our participation as an intervener is required for this suit to continue, and if we do not allow that to happen, it is very likely that the federal court will dismiss the suit and we will be right where we are today. As Mr. Clinch mentioned, these tracts are not currently productive, they are under lease, and are in an area where production is occurring, and where exploration occurs - to expand and find out where this production could extend to within the Powder River Basin. As mentioned, we have about 160 acres at issue with the seven leases within this quiet title action. Acreage that we have currently producing within the CX Field includes one section totally developed with 16 coalbed methane wells on less than 640 acres; and using that as an analog to these lands results in roughly $250,000/year in royalty revenue. What I am telling you is that on these state lands currently producing, and it's common school trust, we are now getting over $86,000 per month in royalty revenue from one section of land. That particular section is within CX Field and part of the water management for that tract does include permits from DEQ allowing the ability to manage water utilizing the Tongue River as a point of discharge. As you are aware, whether or not the river is navigable or not is not just a strict property ownership issue for the school trust, it also arises because the Northern Cheyenne Tribe is using the basis of owning the river, half of the river, to enter into discussions related to jurisdiction over water matters within the Tongue River. That means that the impact to school trust lands could be larger than just the river and the quiet title to the actual ownership that we have; it also has an indirect possibility of impacting the ability for Fidelity to have certainty not only in title but in regulatory status and the ability to continue to produce lands, which may include upland area standard sections of school trust land. So as I said, the only way for it to continue is to allow us to intervene into this suit. The department believes it is clearly in the best interest of the school trust to provide clarity of title for some of the reasons I've laid out. It is also not about precedent; the state in 1981 did, when title of the Big Hole River was in dispute, take action to get that clarified. The department believes it is a prudent course of action, and if Fidelity weren't doing it on our behalf and carrying the load of much of the expense related to the action, we would believe it is prudent to clarify title on our own behalf.

Jon Metropoulos, representing Fidelity Exploration and Production, said I want to commend Mr. Mason on his presentation. I'd like to explain quickly why under the Equal Footing Doctrine the State of Montana, and therefore Fidelity, are in a very good position to make it clear the state owns the bed and banks of the Tongue River and protecting its assets the state can gain the revenues for its solvent purposes from that ownership. I have drawn a poor drawing of the area but as you can see I have labeled where the Crow Indian Reservation is, the Big Horn River, and the litigation that Mr. Mason was referring to that arose in 1981 where the state quieted title to the Big Horn River running through the Crow Reservation. The Northern Cheyenne Reservation is to the east of that and you'll see I left the eastern boundary blank

because of the historical development. The Northern Cheyenne Indian Reservation is what is called an Executive Order Reservation, it was not created by a treaty. That's not important from a legal standpoint, but historically what that allowed the President in 1884 to do is he issued an order creating a reservation for the Northern Cheyenne Tribe and the eastern boundary ran about 10 miles west of the Tongue River. There is no question then that the Tribe owns the Tongue River. In 1889 the Territory of Montana became a state and under the Equal Footing Doctrine as explicitly noted in the Enabling Act the state became the owner of all navigable rivers, which the Tongue River was and is. So in 1889 the state became the owner of the Tongue River. In 1900, for reasons I am not quite sure of perhaps because the Tribe needed more land, President McKinley issued another Executive Order extending the eastern boundary of the Reservation, and it was described as at the center line of the Tongue River. So the question arises can an Executive Order of the President divest a sovereign state of land it owns as sovereign land. And the answer is no. There is a recent case, 2000 I believe, from the Ninth Circuit, Alaska v. United States, in which the Ninth Circuit said that there can be no Indian lands in the bed of a navigable river because such underwater lands as a matter of law were held in trust for the state by United States prior to statehood and passed to the state on statehood. So there the legal question is very clear, if the river is navigable the state owns it. The factual question whether the river is navigable is also quite clear. Historical information indicates logs have been floated down through it and through that very stretch. It is very clear the state owns the river and the state has the right to benefit and the state school trust assets have the right to benefit from that ownership. The problem is, as Mr. Mason mentioned, in 2001 the Northern Cheyenne Tribe applied for what is called treatment as a state which is if that status were granted to the Tribe from EPA would allow them to regulate all the land they claimed they owned. That's fine as to the reservation, but they also claimed they owned the riverbed. That would allow them not only to use or preclude others from using the assets, but to regulate the water quality and discharges to the Tongue River upstream. Fidelity's operations are upstream from the Tongue River Reservoir and coalbed methane is, as it is developed, moving north. Fidelity is not the only company that would like to develop more and make more money from it, but also make more money for the state and counties. But without certainty as to which entity is going to regulate water quality that development will be chilled significantly because in addition to applying for TAS, promulgated water quality standards, specifically controlling coalbed methane development. The Tribe has been very candid in saying it opposes any further coalbed methane development even off the reservation which is upstream. Obviously that is a concern for my client. Mr. Metropoulos handed out copies of the Complaint which was filed in July for quiet title action, which has factual assertions and attachments. The second handout is an article and analysis from the September 15, 2004, *Headwaters News*, and it is stated clearly by the reporter that the Northern Cheyenne Tribe has chosen not to develop coalbed methane and does not want to see coalbed methane be developed. In the analysis, I am not attributing this to the Tribe it is written by the editor, his opinion was the Tribe has chosen relatively pristine poverty over coalbed methane development. My point in bringing this to your attention is we are talking about whether this asset will be developed, we are talking about whether the state will be able to control the development on its land and gain from that development, we are talking about whether the schools will gain financially from this development, and we are talking about whether counties will. In 2003, Big Horn County received back from the state $1.8 million in severance taxes simply from Fidelity's development. We're talking about actual financial benefit to the state. What we're not talking about is whether the state will have any control over this development at all. If the state quiets title to the bed of the river its regulatory functions will be in place, its sovereignty will be in place and the people of this state will have the opportunity through the legislature, through the executive office, through this Board, and through the agencies to regulate development and make sure its clean. If the state doesn't quiet title and the Tribe is given TAS to control water quality standards then the state will not benefit, it will not have the ability to decide how much or how little coalbed methane is developed, that will be in the hands of the Tribe. This is a very important

issue for my client but also for the state as a whole. About half of the Northern Cheyenne Reservation is in Big Horn County and they do get services, including their schools, from the revenues developed by Fidelity's development.

Mr. Morrison asked how many private landowners are there on the east side of the Tongue River whose interests are in play here?

Mr. Metropoulos said along the entire stretch in Montana I can't answer. From the Wyoming border to just north of the Northern Cheyenne Reservation Fidelity has purchased the leases from this Board and leases from the east bank of the river corresponding to the leases it received from this Board. There are some private landowners there that we've leased from in order to develop.

Mr. Morrison said the reason why I asked is Mr. Mason pointed out that this lawsuit you filed potentially has an adverse affect on the fee interest, not only of the Northern Cheyenne Tribe, but of private ranchers who own land adjoining the Tongue River in the east and in order for us to evaluate whether it makes sense for this Board to get involved at this time. One factual issue I'd like to have addressed is whose private property rights are potentially adversely affected by this lawsuit.

Mr. Metropoulos said you would have to consult a detailed land status map but if you look at this map I provided, it is a land status map. The blue indicates state lands and you can see the state lands to be affected if there are discharges to be made from there. The white represents fee lands. The edge of the pink represents where the Tongue River is. There is a number of fee landowners. We're talking about up and down the river but I would point out that we are also talking about if title is not quieted to the Tongue River, we're talking about an adverse affect to the assets the Board has a Constitutional duty to protect.

Mr. Morrison said maybe we are and maybe we aren't. He asked other than the comments of the Tribe in this *New Voices of the West* article, has the Northern Cheyenne Tribe or any of these private ranchers whose lands abut the river taken steps to stop Fidelity from developing? I want to know whether this lawsuit your client has filed potentially affects private property rights is ripe.

Mr. Metropoulos said yes it is ripe. There are a number of different answers to your question. The Tribe and private landowners have filed about 18 lawsuits aimed specifically at delaying or stopping coalbed methane in Montana. Since Fidelity is the only one developing and actually producing, Fidelity's perception is that it is aimed at stopping them specifically. Morally, the Tribe has specifically, in applying for treatment as a state, stated that they want to control the development of coalbed methane and furthermore have stated that their water quality standards if promulgated are designed to not allow any further discharges into the Tongue River. Our experts have confirmed that their water quality standards would in fact do that. If the Tribe obtains that authority, that will be the result.

Mr. Morrison said these 18 lawsuits you refer to, have they asserted that the Tribe has title to the bed and banks?

Mr. Metropoulos said I am not sure. Lawsuits include tens of thousands of pages and millions of words, and they may have. But they have not asserted that as the specific basis for their legal claims in the lawsuits.

Mr. Morrison said have their legal claims that have been raised in these lawsuits asked for remedy in the form of preventing Fidelity from developing on the leases that are in question here today?

Mr. Metropoulos said no they have not. The Tribe has not brought suit over these leases, the sale of these leases to Fidelity.

Mr. Morrison said it seems to me there are factual questions about what the Tribe's position is, what the private landowner's position is, and how many private landowner's property rights are potentially affected by this lawsuit that really need to be answered. I would advise the Attorney General to comment, but I am concerned about those and I would like to have those answered before we jump into becoming a Plaintiff in a lawsuit.

Tommy Butler, DNRC, said Auditor Morrison had a question about whether the Tribe had tried to stop Fidelity and it is important the Board understand the process by which oil and gas properties are developed. An unclear title acts almost as an absolute bar to further development. The reason being is that every mineral acre is highly productive and no responsible mineral operator would ever begin to develop a property without knowing exactly who had title to each mineral acre in that area. There are exceptions. Were we dealing totally with fee lands here and you had an unknown owner, there are processes by which you can place that interest in an escrow or a trust to be adjudicated later by a court. We are not dealing with that here. We are dealing with a highly unusual set of circumstances with the Tribe. They have made a claim to the EPA that they do own this property. No responsible operator would go forward at this point because it potentially could bankrupt an operator if you made a mistake and paid those royalties to the wrong person. The process for going forward here if you want to see any development on these properties, is to adjudicate title.

Mr. Morrison said has Fidelity or the department done anything to try to obtain agreements from these landowners to avoid unnecessary litigation?

Mr. Metropoulos said Fidelity has obtained agreement from the landowners that are directly adjacent to the east of these leases. We've obtained leases there as well, because we are not proposing to drill directly in the riverbed it would be directional drilling. So we have directly to the east but not up and down the length of the Tongue River. I would say, however, because our leases are right next to the Reservation the precise question we presented in the Complaint is ownership of that stretch of the river. I have to admit the logical conclusion would be ownership for the entire length of the river. I'd also like to say an issue of ripeness arises when there are conflicting claims to title, you don't necessarily have to have Party B suing Party A rather than A suing B, legally this is ripe. If you're suggesting, however, that Fidelity should actually start producing from those leases, I've got to second what Mr. Butler said, it would be imprudent from a financial standpoint for us to do that without knowing who to pay royalties and taxes to. In addition, the Big Horn River litigation that went through the Crow Reservation was extremely bitter and there were actually shots fired and people standing on bridges shooting at fishermen who wanted to access the river because it is navigable and others who didn't think they should be there. We're trying to take this in a very civil step by step process with foresight and not get into such bitter type hostilities. Legally I think it is ripe before you get that much bitterness.

Governor Martz said before anything can be done, the question has to be answered who the land belongs to, regardless of the leases on the other side. You mentioned something and said the schools would benefit from development, I've worked on energy issues in the nation and we need to do it not to just get the resource but it has to be environmentally safe. The bottom line is the question has to be answered.

Mr. Metropoulos said its true, the Powder River Basin goes between two states, and the State of Wyoming has a huge surplus and we don't. The nation could benefit, Wyoming could benefit more and certainly Montana could.

Mr. McGrath said as Director Clinch indicated, this is an item that has been discussed for a long time and maybe that discussion has occurred at DNRC, but I'm the state's Chief Legal Officer and this is news to me. The first time I heard about this was following the staffer's meeting on Wednesday. I think I should have been consulted, this has huge implications. It is not a decision we ought to make with two day's notice to the state's chief legal office. What's more, there are no challenges to the state's leases at this time. None. Our leases have not been challenged so why are we being asked to do this today? It seems to me that this is an issue that needs to have some study and research, legally, to determine where we stand. This is not merely a political decision because one group thinks we should develop, this is a significant issue that should be discussed in a significant manner, and I have not been consulted. I do not think that the issue is ripe now, nobody has challenged our leases. If they do it's a matter that the next Land Board can deal with at that time. I also understand that it is the position of the federal solicitor that this is a case that has no merit, they intend to file a motion to dismiss and have the case dismissed. Finally, one of the issues we need to discuss is we do have a water right compact with the Northern Cheyenne Tribe, the state has ratified it, the legislature has approved it, and Congress approved it. The issues relative to the water rights on the Tongue River have been adjudicated. One of the things we have to determine before we run off recklessly and enjoin ourselves in a private lawsuit is how that affects what we've done in terms of the agreements we had with the Tribe on the water compact. Based on that I have no intention of voting for this.

Mr. Clinch said in response, Mr. Attorney General, it is unfortunate that you're not in the loop on this, but it is important for you and the audience to recognize that when this was brought to our attention in September, we had initial conversations with Land Board staffers, i.e., specifically Candy West. Tommy Butler and Candy spoke at length on this issue over the phone on our intention of bringing this before the September Land Board meeting. We were drafting the agenda item when Candy called back and told us that she had had a discussion with you, and that it was the position of the Attorney General's office that this not come before the Board at this time. So we delayed that anticipating we would be able to work out the differences. The issue has now come up to an October 25th deadline, it was the Governor who directed me to bring this forth. It is unfortunate there has been a breakdown between Candy and yourself, but we in no uncertain terms, don't attempt to spring these items onto any of the Land Board members.

Mr. Morrison said I would like to mention a procedural point. Obviously, the issue of ripeness is going to be determined by this court. If the issue is not ripe there is no reason for the state to be jumping into this lawsuit and spending time and money on it. If the issue is ripe then we would have an opportunity to decide at that time whether it makes sense to us to intervene. There is no reason for us to deal with this right now, it is premature for this Board. There is a full opportunity after those preliminary evaluations of the timeliness and merits or the timeliness and justiciability of the case are made by the judge.

Mr. Metropoulos said an issue of ripeness is one of a handful of preliminary jurisprudential issues that a federal court has to decide before moving to the merits. As I understand it from the solicitor from the Department of Interior, it intends to file a motion to dismiss which is a common procedural device and does not indicate the case is without merit. That would raise some of those preliminary prudential issues and the court may never get to the issue of ripeness. The first issue is whether we have all the necessary parties under Rule 19 and as Mr. Mason said, the state as the sovereign, as the owner, is in all likelihood a necessary party. If the state is not in the suit, the court could dismiss it and never discuss ripeness. On

the issue of ripeness, I cut my teeth as a lawyer 16 years ago in litigation in federal court on these very similar issues and ripeness is one of them. This is legally ripe. The state claims ownership, the Tribe claims ownership. I don't have any question that this is legally ripe. We may lose on one of the other preliminary issues but I don't think we'd lose on that one.

Mr. Morrison said my point is though I understand that is your position but the issue apparently is going to be adjudicated. The issue or ripeness will be adjudicated, the issue of whether the action fails to state a claim will be adjudicated. There will be preliminary Rule 12-type motions decided at the outset and if the case gets past that and it is found that we've stated a valid claim and it is ripe it is certainly not too late for this Board at that time to make a decision about whether to intervene on the merits. Isn't that true?

Mr. Metropoulos said I respectfully disagree. What would happen if a Motion to Dismiss is granted under Rule 12, the case is dismissed without prejudice the state would then have to bring suit on its own, Fidelity would lose the value of its leases and in all likelihood the state would lose the power over the river and you would not benefit your trust assets by managing them.

Mr. Morrison said when do you anticipate the preliminary motions are going to be addressed by the court? Have they been made and briefed?

Mr. Metropoulos said no. The United States is to respond on October 25 or 28, I am sure we won't respond until about Christmas. It will be sometime during the legislative session when the court will rule.

Mr. Morrison said have the motions actually been made?

Mr. Metropoulos said no.

Mr. Brown said Mr. Butler, clarify here the points that have been made but I want to make sure they are clear. What is the state's interest in granting the department's request that we intervene?

Mr. Butler said the state's interest here is to clarify mineral title for the active bed of the Tongue River. And it is in the best interest of the trust to clarify that title earlier rather than later just because of the time value of money. You're dealing with a potentially significant amount of royalties. If you take the CX Field Ranch as an example, $250,000 per year. That could be anywhere from $100,000 to $250,000 per month once you have active development and production, and that is just for our portion of the acreage here on the bed of the Tongue River. If you're dealing with that type of revenue stream, it is best to clarify title quickly so development can proceed rather than wait. A dollar today is worth a lot more than a dollar you might have had ten years ago.

Mr. Brown asked why should be take this action today? Why should we act on your request that we intervene today?

Mr. Butler said there are several reasons. One is that contrary to many situations we have an active partner here, Fidelity, who is willing to bear a substantial burden of the litigation costs. We don't often see that in these quiet title actions. This Board has dealt many, many times with quiet title actions on navigable waterways, albeit not always with Tribes. That is an added impact. But clarity to title is good for the trust beneficiaries and it's good for the Tribe. Everyone will know what they own, and it allows people to go forward. If you have uncertainty development will not occur for anyone.

Mr. Morrison said as I understand your testimony there is no reason why we have to intervene today. We can watch this litigation and see how it develops, and give Fidelity an opportunity to do what I wish they had already done which is sit with the Attorney General and explain the state's interest, explain the theory of the case, explain the reason why the state belongs in the lawsuit, give the Attorney General an opportunity to evaluate this and there will be no potential harm to the state's interest here as a result of the state not entering this lawsuit today. If we choose to enter in November or December we will have a better picture of what this litigation looks like and a better picture of what the potential interests of the state are.

Mr. Butler said we have been talking with Candy West for the last two months about every aspect of this case and particularly about the jurisdiction of the court and about the Alaska v. Babbitt case and whether the state can properly be a party in this case under the federal Quiet Title Act. We've fully looked at this and we've looked at the factual basis for the state's claim. Under the current test, the log floating test, there is no doubt that in 1879 and 1881 there were two separate log drives down the Tongue River, that is documented in historical references from a journal in Miles City. We feel the state has a very strong claim to the bed of the Tongue River and we've looked at every legal aspect of this. We thought we were communicating with the Attorney General's office on exactly that. In any event, to answer your question is it important that we jump in now, I think that it is better to jump in earlier than to jump in later. We had quiet title action that a private party had brought over in the Deer Lodge Valley relating to roads across trust lands and we didn't jump into that one and then we sought to jump into it later in the litigation and we were refused. So I guess the point is if you want to diligently and zealously represent the interests of the trust beneficiaries, its better to jump in earlier rather than later because you might not have a chance later.

Mr. Brown moved the Board grant the request by the Department of Natural Resources and Conservation to intervene in the quiet title action to defend the state's mineral interest in the legal action referenced in 1004-1. It seems to me we need to get this thing resolved and the state needs to be involved in the resolution and I haven't heard anything that persuades me conclusively that it is in our interest to delay. It may be that this is premature, but certainly the State of Montana by becoming an intervener in this legal action doesn't lose anything, we might stand to lose significantly if we delay. Motion was seconded by Governor Martz. Motion failed three to two. Mr. Brown and Governor Martz in favor, Attorney General McGrath, State Auditor Morrison, and Superintendent of Public Instruction McCulloch opposed.

1004-2 REQUEST FOR APPROVAL OF RIGHTS-OF-WAY APPLICATIONS

This month there are 19 requests for rights-of-way. Numbers 12601, 12602 and 12734 are from the Montana Department of Transportation for highway construction and maintenance; #12726 is from Central Montana Communications for a buried fiber optic and copper communications cable; #12727, 12728, and 12729 are from Fergus Electric Cooperative for an overhead electric transmission line; #12730 is from McCone Electric Cooperative for an overhead electric distribution power line; #12731 is from Hill County Electric Cooperative for an overhead electric distribution line; #12732 is from Sheridan Electric Cooperative for an overhead electric distribution line; #12733 is from Lake County for highway bridge construction and maintenance; #12735, 12736, and 12737 are from Calhoun Montana Limited Partnership for private access road to a single family residence; #3730, 6794, 6839 (amended) are cost share FRTA easement – Calico from the US Dept. of Agriculture, Lolo National Forest for an exclusive public road; #5197 (amended) is a cost share FRTA easement – Deerhorn from the US Dept. of Agriculture, Lolo National Forest for an exclusive public road; #5317 (amended) is a cost share FRTA

easement – Mudd Creek from the US Dept. of Agriculture, Lolo National Forest for an exclusive public land; #5974 (amended) is a cost share FRTA easement – Lang Creek from the US Dept. of Agriculture, Kootenai National Forest for an exclusive public road; and #12738 is a cost share FRTA easement – Lost-City from the US Dept. of Agriculture, Flathead National Forest for an exclusive public access road. Mr. Clinch requested approval from the Board.

Motion was made by Mr. Morrison to approve the rights-of-way application packet. Seconded by Ms. McCulloch. Motion carried unanimously.

PUBLIC COMMENT:

Lara Eisenbarth, Montana PTA, said one of the goals of the Board of the PTA is to build knowledge and observe the State Land Board as trustees fulfilling their fiduciary duty to the schools in Montana. We recognize that the state as trustee as an absolute duty to manage the trust estate for the exclusive benefit of the beneficiaries and to extract full value from the use and disposition of that trust property. The State as the trustee, owes the beneficiaries of the trust its undivided loyalty and good faith and its acts must be in the sole interest of the beneficiaries. The Montana PTA is here as an advocate for those beneficiaries to effectively support prudent management of school trust.

William Walksalong, Northern Cheyenne Tribal Council, said I received notice the Fidelity case was on the agenda so I made an effort to be here this morning. While on the Council I have been particularly involved with issues relating to Fidelity Exploration and Production Company and I am here today on behalf of the Northern Cheyenne Tribe to urge the Land Board not to become involved in the lawsuit filed by Fidelity against the United States concerning the Tongue River. The eastern boundary of the Northern Cheyenne Reservation was established as the middle channel of the Tongue River over 100 years ago by an Executive Order signed by President McKinley on March 19, 1900. Since that time the state has never made a claim to the bed of the Tongue River within the Reservation and we do not think the state should do so now at the behest of an energy company. Such an action can only jeopardize a government relationship between the Northern Cheyenne Tribe and the state. The jurisdictional battle that would result would have a greater and long lasting impact than the temporary gain to the state and Fidelity from the less than 80 acres in the Reservation that are involved. Mr. Walksalong stated that the state has never made a claim to the bed of the river for the last 100 years for good reason because there is no valid claim can be made. He also asserted that the DNRC's own list of navigable waters within the state does not include this portion of the Tongue River and the river has never been adjudicated as navigable. The terms of the Executive Order are clear in establishing the boundary as the middle of the channel and are themselves indication that the river was not considered navigable just as now. The boundaries of the Reservation were confirmed by Congress in the 1926 Northern Cheyenne Allotment Act which was what the Supreme Court has interpreted as statutorily establishing the Reservation. This is in an 1976 case, Northern Cheyenne Tribe v. Hollowbrest, even the state legislature confirmed the boundary when it legislatively approved the Northern Cheyenne-Montana Water Rights Compact in 1991. No claim to ownership to the bed of the river was made then or since. To raise such a claim now the context of the suit filed by Fidelity we believe would be a futile effort in any case. The quiet title action will almost certainly be dismissed under the terms of the federal quiet title act which is exclusive means for bringing such a claim. That Act specifically states that the United States does not waive its sovereign immunity for quiet title actions involving trust over restricted Indian lands like the lands involved here. As well, the quiet title action is almost certainly barred by the 12-year statute of limitations and the quiet title act. The state has had notice of the Executive Order since 1900 and has had notice as recently as 1991 when the

state legislature approved the Compact with the Tribe which includes the definition of the Reservation as established by the Executive Order in 1884 and 1900. We are aware that Fidelity's lawsuit may be motivated by means other than simply an interest in quiet titling the bed of the Tongue River. We do not know whether the state chose those motivations. Whatever concerns the state may have about the Tribe's proposed water quality standards or any other issue, the Tribe believes it would be better for the state to sit down with the Tribe to discuss those concerns openly and honestly rather than become a backdoor effort initiated by Fidelity. The Tribe attempted to engage in such discussions with DEQ last May without success. However, we would respond favorably to any such request by the Governor or DEQ for this purpose.

Motion was made by Mr. Morrison to adjourn. Seconded by Ms. McCulloch.